

*a***PUBLIC PROSECUTOR****v.****CHONG WEI KIAN**

HIGH COURT MALAYA, JOHOR BAHRU

JAMES FOONG JC

b

[CRIMINAL TRIAL NO. 58-1/1986]

23 JUNE 1990

CRIMINAL PROCEDURE: *Dangerous drugs - Trafficking of heroin - Prima facie case - Proof of exclusivity of possession - Presumptions under s. 37(b),(d) and (g) of Dangerous Drugs Act 1952.*

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EVIDENCE: *Expert witnesses - Whether evidence acceptable - Manner of tendering expert evidence.*

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The accused was charged with offence of trafficking in heroin under section 39B(1)(a) of the Dangerous Drugs Act (the Act). The accused's premises were raided and the incriminating substances were found in a room of the premises. The accused was then arrested. The investigating officer attended the accused's premises 10 days after the arrest whereby he made certain observations in relation to the room in which the substances were found. The substances were analysed by a chemist from the chemistry department as being heroin.

Held:*e*

[1] The prosecution did not adduce sufficient evidence to evoke the presumptions under s. 37(b), (d) and (g) of the Act; the evidence presented did not show sufficient exclusivity of possession to make the accused an occupier of the premises and there was also a break in the chain of the prosecution's case.

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[2] The chemist was not an expert witness since no evidence was tendered to show his qualification and experience except for the fact that he had been a chemist for 18 years. The Court held that in tendering evidence of expert witnesses, the principle enunciated by Hashim J in *Wong Chop Saow v. PP* should be followed.

[Accused acquitted and discharged.]

Cases referred to:

PP v. Aris bin Yunus [1989] 2 CLJ (Rep) 289

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Wong Chop Saow v. PP [1965] 1 MLJ 247

Legislation referred to:

Dangerous Drugs Act 1952, ss. 39B(1)(a), (2), 37(b),(d),(g)

For the prosecution - Hadariah bte Syed Ismail

For the accused - R.K. Menon; M/s. R.K. Menon & Co.

*h***JUDGMENT****James Foong JC:**

The accused is charged for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952.

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The charge against him is as follows:

That you on 9 October 1984 at about 10p.m. at No. 96-D Jalan Wong Ah Fook, Johor Bahru, in the District of Johor, in the State of Johore, did on your own behalf traffic in Dangerous Drugs to wit “heroin” weight 19.408 grams, in contravention with the provisions of s. 39B(1)(a) of the Dangerous Drug Act 1952, and that you have thereby committed an offence punishable under s. 39B(2) of the said Act, Act 234 (Revised 1980).

The facts of this case are as follows:

On 9 September 1984 one Inspector Kamaludin Kassim (PW1) attached to the Balai Polis Central in Johore Bahru together with his team of policemen comprising of Corporal Badron (PW2), DPC Muda, DPC Abdul Wahid and DPC Asaari while on patrol stopped the accused along the five foot way at Bangunan Tan Cheng, Jalan Meldrum, Johore Bahru at or about 10 p.m.

On questioning the accused, the accused led Inspector Kamaludin and his said team of men to premises 96-D, Jalan Wong Ah Fook, Johore Bahru. There using a set of 2 keys recovered from the trousers pockets of the accused he opened the front grill door to the said premises. There were 5 rooms with an addition of one sitting room to the said premises as shown in sketch plan (P9).

Again with the set of keys earlier taken from the accused, Inspector Kamaludin opened a room marked X on the sketch plan, as shown by the accused to him.

In the room he found a box with old newspapers piled on top. In this box he found a bottle (P7) and 2 small plastic packets. (P6A & B) containing substance believed to be heroin. Among the old newspapers he also found 2 small plastic packets (P6C & D) which contained substance which he believed to be heroin.

Besides that he also recovered from the said room a restricted passport only for entry to Singapore (P3) in the name of the accused and a Public Bank account book (P2) in the name of the accused.

The accused was then arrested and brought to Balai Polis Cawangan Anti Dadah (CAD) Johore Bahru where together with the exhibits the accused was then handed over to Inspector Jasbir Singh (PW5) the investigating officer.

Inspector Jasbir Singh being new to the job as he admitted in evidence at that material time went to the scene of crime only on 21 October 1984, some 10 days after the event. On arrival at room X of the said premises he found the room unlocked and completely emptied as shown in photos P10 E & F.

The room D he observed was partitioned but not completely sealed off from the ceiling of the premises. It leaves a gap which according to him was big enough for a person to climb into the room.

Det. Sgt. Badron (PW2) who was a member in the raiding party threw some light to the contents of the room. According to him it contained a plastic cupboard, a green coloured mattress, a pillow, a box and many old newspapers.

The suspected drugs were sent by Inspector Jasbir Singh to the Chemistry Department, Johore Bahru for analysis. One Mr. Qua Sai Chuan (PW4) from the chemistry department was called to testify. He said “saya bertugas sebagai seorang ahli kimia selama 18 tahun.” After that he proceeded to give evidence to say that the substance which were sent to him by Inspector Jasbir Singh for analysis are heroin and had a nett weight of 19.408 grams.

a At the close of the prosecution's case, the Court heard submissions from both the learned DPP and the defence Counsel.

I held that the prosecution have failed to prove a *prima facie* case against the accused.

b The accused was charged under s. 39B(1)(a) of the Dangerous Drugs Act for trafficking in heroin, a dangerous drug listed under schedule 1 of the said Act. Under this section the prosecution must adduce evidence to the effect that the accused was in possession of the said heroin. The evidence which the prosecution relied on to prove their point are as follows:

(a) the accused informed the police where he lived,

(b) thereafter the police went to the said premises and using a set of keys taken from the accused's pocket gained entry into room X,

c (c) there besides the heroin they also recovered the passport and bank account book with the accused's name thereon.

The learned DPP in her submission relied on the presumption as laid down under s. 37(b), (d) and (g) of the Dangerous Drugs Act.

d I find that the prosecution have not adduced sufficient evidence to evoke the presumption under s. 37(b).

Section 37(b) requires evidence to show that the accused was an occupier of room or had or appeared to have had the care and management of the said room. The mere presence of the keys obtained from his pocket, the passport and the bank book bearing his name found therein are insufficient evidence to activate this presumption without further evidence being adduced by the prosecution.

e Without any further evidence many doubts are cast such as:

(a) how many people have keys to the said room X,

(b) is the accused the only person having the key to room X,

f (c) could there be other occupiers to room X,

(d) could someone have climbed over the partition to enter into the room X since the room's partition does not meet the ceiling for the said premises,

(e) has the accused the exclusive use of the room,

(f) did the accused have or appeared to have had the care and management of room X,

g (g) could there be other people besides the accused who can enter and leave the said room freely.

The prosecution have not called any other witnesses to testify as to whether the accused was a tenant or even an occupier of room X. Neither are there any exhibits such as other personal effects tendered to show (besides the passport and bank book) that he has the exclusive right to the use of the said room. In fact investigation in this case was so poorly conducted that by the time Inspector Jasbir Singh went to the scene of the crime some 10 days later, all the things in the room were gone. Photograph P10 shows an empty room.

h Adopting the views of Mr. Justice Shankar in *PP v. Aris bin Yunus* [1989] 2 CLJ (Rep) 289, "there must be a sufficient exclusivity of possession to make a person an occupier." In this case, I find that such evidence are absent.

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Again under s. 37(d) of the Dangerous Drugs Act the presumption therein cannot arise since basing on the same principles stated above, the accused cannot be said to have had in custody or under his control the heroin.

The learned DPP also submitted that under s. 37(g) of Dangerous Drugs Act the presumption therein also applies in this case. To this I do not agree. Before this presumption can be activated there must be evidence of exclusive possession to make the accused an occupier. In this case there is no evidence proved beyond reasonable doubt of this fact.

I also ruled that the witness Qua Sai Chuan (PW4) is not an expert witness. No evidence was tendered to show his qualification and experience except the fact that he has been a chemist for 18 years. Without the evidence of an expert, I cannot find that the substance in the four small plastic packets (P6A - D) and the bottle (P7) is heroin as defined under the Dangerous Drugs Act.

In this respect I like to quote the advice of the late Mr. Justice Hashim given in the case of *Wong Chop Saow v. PP* [1965] 1 MLJ 247:

May I, with respect, suggest that to avoid confusion the expert witness should give his evidence as follows. He should first state his qualification as an expert. He should then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the Courts. He should then proceeded to describe ...

This approach should be followed by all parties tendering evidence of expert witnesses.

I am sad to say that even the box in which the bottle (P7) suspected to contain heroin which was an item seized and handed over to Inspector Jasbir Singh by Inspector Kamaludin was not tendered to the Court. I was informed by the learned DPP that this box is missing. This causes a break in the chain of the prosecution's case. The investigation and the subsequent conduct of this case is a far cry from the standard I would have expected from the prosecution.

In view of the aforesaid, I acquitted and discharged the accused without calling upon him to enter his defence.

Also found at [1990] 2 CLJ 435

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